Halal Brothers Limited (On their own behalf and on behalf of all the People squatting on plot number Kilifi/Kijipwa/48) v Rimba & 2 others (Civil Suit 334 of 1996) [2023] KEELC 21635 (KLR) (7 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21635 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 334 OF 1996

LL NAIKUNI, J

NOVEMBER 7, 2023

BETWEEN

HALAL BROTHERS LIMITED ..... PLAINTIFF

ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE PEOPLE SQUATTING ON PLOT NUMBER KILIFI/KIJIPWA/48

AND

ROY RIMBA ..... 1ST DEFENDANT

ROY NYALE ..... 2ND DEFENDANT

KAHINDI NDAGO ..... 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honorable Court relates to the Civil Suit instituted by "the Halai Brothers Limited" the Plaintiff herein. Its instructive to note as a point of background information that this rather protracted matter has been pending before this Honourable Court for a record period of twenty seven (27) years!!. In the course of time and from the records, it was presided over by ten (10) Judges including myself – one of whom became and has retired as a Chief Justice of Kenya; while the others are still sitting as the Judges of the Supreme Court and the Court of Appeal respectively. Likewise, I have taken Judicial notice that three (3) of the Advocates who appeared for the parties in the matter have been elevated to the position of Judges of High Court of Kenya and the Parliament – the senate. It is an unacceptable scenario being a clear epitome of "Justice delayed, is Justice denied".

2. Be that at it may, the Honourable Court was moved through a filed Plaint dated 18th June, 1996 against the 1st, 2nd and 3rd Defendants herein. (Herein after referred as The Defendants) acting on behalf of other inhabitants allegedly as squatters on the suit land. Subsequently, with the leave of Court, the

Plaint filed a Further Amended Plaint dated 19th May, 2017 and filed in Court on 23rd May, 2017 thereof.

3. Upon service of the Summons to enter appearance thereof and all the pleadings, on 15th August, 1996, the Defendants filed a Defence and thereafter on 25th March, 2021 filed an undated Amended Statement of Defence and Counter Claim thereof. In a nutshell, the suit revolves the ownership of the suit land tussle between the Plaintiff and the Defendants on the basis of acquisition of suit land by way of attaining a bona fide Certificate of title deed through purchase for value on the one hand and on the other a claim of title through land adverse possession and settlement scheme accordingly.

4. Based on this and upon full compliance of the provision of Order 11 of the Civil Procedure Rules, 2010 Parties having filed Summons for directions and statement of agreed issues dated 20th July, 1997 directions were taken at a pre-trial conference and the matter was fixed for full trial accordingly.

5. At this juncture, I wish to point out that despite the parties having closed their cases it became imperative for the court to conduct a site visit onto the suit property. Hence, on 13th October, 2023 with the consensus of all parties, and pursuant to a court order, the Court conducted a very successful and informative Site Visit ("Locus in Quo") on the land. The site visit was based on the provision of Section 173 of the *Evidence Act* Cap. 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010. Indeed, a comprehensive report has re – produced verbatim herein this Judgement for ease of reference.

II. The Plaintiff's Case

6. From the filed pleadings herein being the Further Amended Plaint dated 19th May, 2017 and filed in Court on 23rd May, 2017, and the undated Amended Statement of Defence and Counter Claim filed on 25th March, 2021 the Plaintiff averred that at all material times he was and is legal registered and the absolute proprietor of all that parcel of land known as Land Reference Number Kilifi/Kijipwa/48 (Hereinafter referred to as "The Suit Land") which measures Approximately 19.89 Hectares or thereabout (approximately 49.15 acres). According to the Plaintiff, the Defendants had unlawfully encroached onto the Suit Parcel of land and had continued to stay thereon without any permission or authority from them whatsoever.

7. The Plaintiff averred that in the course of their encroachment, the Defendants had chased away its employees and barred the Plaintiff from undertaking any meaningful and tangible development on the plot, According to the Plaintiff, they had intended to build residential cottages for commercial purposes on it. Thus, as a result, it caused the Plaintiff unnecessary costs and expenses and denying them quiet enjoyment to its property.

8. In order to respectively ameliorate the situation, they attempted an amicable negotiation with the Defendants. However, the Plaintiff held that all efforts to resolve the dispute using all the relevant authorities including the Government and the Local Administration had become fruitless causing to institute this suit against the Defendants. The Plaintiffs stated they were only able to sue three (3) Defendants as most of the other squatters on the Suit land concealed their names. Arising from these, the Plaintiff filed this Suit sought for the following orders:-

    a. A declaration that the Plaintiff was the absolute registered owner of all the suit land.

    b. A Mandatory injunction to compel the Defendants, their relatives, agents, servants and/or any other person under instructions to the Defendants to give vacant possession of the property and to demolish the structures constructed

thereon and to remove all materials failing and/or alternative the structures be demolished and removed at their costs.

c. An order of permanent Injunction restraining the persons mentioned in (b) above trespassing and/or encroaching upon and/or interfering in any of the said property;

d. Upon issuance of Prayer (a), (b) and (c) the Honourable Court be pleased to issue an eviction order against the Defendants.

e. Eviction of the Defendants from the suit property to be done with the assistance of the OCS Kijipwa Police Station; and

f. Costs of the Suit together with interests at Court rates.

g. Interests.

III. The testimony adduced by the Plaintiffs witnesses

9. On 12th March, 2019, the Plaintiff commenced testifying and summoned Plaintiff Witness (PW – 1) who testified and closed its case on the said material day. Procedurally, it will be noted that upon the Plaintiff's closing its case, the Defendant sought leave to amend and indeed filed an Amended Defence and Counter Claim thereafter. While granting leave, the Plaintiff was also allowed to recall PW - 1 to re-testify once again particularly onto the new issues raised by the Defendants. The testimony by the PW - 1 was of:

A. Examination in Chief of PW - 1 by Mr. Gakuo Advocate.

10. PW – 1 was sworn and testified in the English language. He identified himself as Mahendra Harji Halai. He was the Director of the Plaintiff's Company. On 17th March, 2017, he signed and filed a witness statement. He adopted the said witness statement as his evidence in chief. He informed the Court having been given the authority from the Plaintiff's company to testify on its behalf under the company seal which he produced and marked as Plaintiff Exhibit - 1. He informed court that the Plaintiff Company was the legal owner of the suit property - Plot No. Kilifi/Kijipwa/48. They had in their possession and custody the original Certificate of a title deed for the suit land. He produced the said title an exhibit – Plaintiff Exhibit-2. On 22nd July, 2017, they conducted an official search. The certificate of search showed the Plaintiff company was the owner. The search was produced as – Plaintiff Exhibit – 3.

11. PW – 1 informed Court that they purchased the property from Mr. Ranjan Madan Gopal Saini. The transfer was dated 29th March, 1996 – which he produced and marked as Plaintiff Exhibit 4. The purchase price for the suit property was for a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500, 000.00/=) as consideration. The cheque used for the payment was dated 13th May, 1996 produced as Plaintiff Exhibit No. 5. They paid the stamp duty on 29th March, 1996. The official receipt bearing No. C868630 was produced and marked as Plaintiff Exhibit - 6, When they acquired the property, it was vacant and full of bushes. There was no single person nor development on it. They wanted to develop Masonite's for commercial purposes in that area. Unfortunately, the Plaintiff was not able to develop the land due to the invasion by squatters who are the Defendants herein who stormed in after the Plaintiff had purchased and acquired it.

12. Soon after acquiring the land, they had appointed M/s. H.S Kizondo, a Contractor to build a boundary/ perimeter wall around the suit property and to clear off the plot of any unwanted elements or persons. They instructed him vide letter dated 9th April, 1996 which letter PW -1 produced as

Plaintiff Exhibit - 7. But according to PW – 1, the Contractor was not able to undertake any of the tasks assigned because he encountered and was confronted by squatters. Some of the squatters were the Defendants herein. The Contractor came back to them and reported his ordeal of having encountered a problem vide letter dated 15th April, 1996 produced as Plaintiff Exhibit - 8. Vided a letter dated 22nd April, 1996, the Contractor wrote to the locational Chief of the area. The Chief replied to the letter by the Contractor marked as Plaintiff Exhibit – 9. On 25th April, 1996, the Plaintiff wrote back to the Chief informing him that they had bought the land legally and of heir intention – Plaintiff Exhibit - 10. PW-1 stated that the Chief replied by simply stating that it appeared the land had some unspecified dispute. The squatters had started putting up permanent and temporary structures on the land.

13. In the Course of time, PW-1 informed court that they instructed a Land Valuer to carry out land valuation. The valuer was M/s. Tysons Limited who on 6th March, 2015 conducted the inspection and prepared a valuation report dated 10th march, 2025. It stated that there were no development apart from a few semi-permanent structures and encumbrances on the land and by then it was valued at a sum of Kenya Shillings Two Ninety Five Million (Kshs. 295, 000, 000.00/=) by then. The Valuers Report with a set of twenty six (26) back and white photographs of a few semi-permanent structures including a school and some makuti semi permanent houses was produced and marked as Plaintiff Exhibit - 11. The Plaintiff had put water connections to the plot. The receipts were on Pages 16, 17, 18 and 19 marked as Plaintiff Exhibits 12 (a) (b) (c) and (d). Plaintiff was a limited liability company and held a Certificate of Incorporation bearing numbers 24791 issued on 14th October, 1982 was at page 15. It was produced and marked as Plaintiff Exhibit - 13. The Defendants were still on the land since the year 2015 todate. He prayed that they give vacant possession of the suit land and their illegal constructions should be demolished. It was true they had never lived on the land but acquired it for purposes of developing it. He reiterated at the time when they acquired it was vacant and bushes. There were no graves nor trees of over 40 years as alleged.

14. They had never been known to the Defendants. They bought the land from the person who had a title in his name. It was a good title having been issued regularly. When the land was bought, PW – 1 was there. It was vacant. The land was not ancestral land as title had been issued to the previous owner. They never obtained the title deed fraudulently. They acquired the land from the previous owner. They had never got it illegally.

15. Their Certificate of title deed should not be cancelled because they acquired the property legally. The Defendants could not be registered in place of the Plaintiff because they were not the owners. The land had and still has a lot of murram. It was good for construction and not for farming. The Plaintiff stressed and urged the Court to have the structures on the land be demolished. He produced the official search dated 23rd January, 2018 which indicated the land was registered in their names as an exhibit – Plaintiff Exhibit 14. He prayed that the squatters be ordered to vacate from the suit land and their structures demolished so that the Plaintiff could develop on their property.

B. Cross Examination of PW – 1 by Mr. Kinyanjui Advocate.

16. He was a director of the Plaintiff's company from the year 1996. Before they bought the property, they did an inspection on the ground and found that it was vacant and bushy. There were no trees nor graves as alleged. PW – 1 personally went there before buying the land. That was in January, 1996. He was aware that besides of the three (3) Defendants, there were many other squatters. The transfer of the land to the Plaintiff was made in April/May 1996 by the previous owner. They involved the area Chief in the year 1996. They were hostile to hem and they could not do their work. Immediately they bought the land, the squatters moved in. They did not know when they moved there. When the Plaintiff went

to survey the land, they found them on it. PW – 1 went there when Tysons Valuers Ltd and prepared the report.

17. They attempted some reconciliation with the Defendants and other people using the Government Officials but the squatters were wild and uncooperative and that was why they reported to the chief who could not settle the matter. Hence filing of this suit. He could not remember the time/month they filed the suit. They found shrubs. They never found any mango or coconut trees grown on the land. They never saw any livestock. He was not aware there was a Public Primary School on the land. In the year 2010, when the case was still pending, they attempted to subdivide the land for their own development. They never went to the Land Control Board.

18. He was not aware that the suit was previously a settlement scheme. They had never been engaged by the National Land Commission over the matter. Neither had they ever been summoned by the National Land Commission. He was not aware of any deliberations by the National Land Commission. PW – 1 was not aware that squatters were to get small portions of the scheme. They valued the land in the year 2015 for their own development purposes. At page 8 of the valuation report, the valuer stated the extent to which the plot was invaded was widespread and any attempts to obtain vacant possession would be costly. When they went to survey the suit land, there were no graveyards. When they filed the suit, there were about 21 squatters occupying about 49 acres. PW – 1 never found any old borehole. They had amended the suit a number of times.

19. Among the documents attached was an Authority under seal for him to represent directors of the company in this suit. He could not remember who had authorized him to act on their behalf in the year 1996 to act for the company. He could not remember if there was an authority. Prior to buying the property, they undertook an official search. The official search showed that the property was in the name of Ranjan Manjan Gopal Saini. He was the first registered owner. He was not aware if the suit property had had a problem in the year1985. He was aware there was Plot No. 53 in the neighborhood. It was adjacent to their plot. He was not aware whether it was part of the Kijipwa Settlement Scheme.

20. In the letter dated 25th April, 1996 (Plaintiff Exhibit 100), the reference was Kijipwa Scheme. This was a reply to his letter dated 22nd April, 1996. When they purchased the suit land, there were no squatters but by the time they engaged the chief, they had taken possession. I want the court to order vacant possession so that I can develop it.

C. Re - Examination of PW – 1 by Mr. Gakuo Advocate.

21. When the Plaintiff purchased the land, the previous owner had a title deed. The conducted search showed he was the registered owner. He had never participated in any other forum apart from this court. When they purchased the land, it was vacant. The squatters invaded the land when the contractor went to the land. He never saw any graveyards. No photographs of graveyards, trees had been shown by the Defendants. The Defendants invaded the land immediately the Plaintiff bought it in the year 1996. The Plaintiff company was the registered owner. The squatters were trespassers and should be evicted. They had not subdivided the land. That marked the close of the Plaintiff's case.

IV. The 1st, 2nd & 3rd Defendants' case

22. As already indicated above, the 1st, 2nd and 3rd Defendants on 15th August, 1996 filed their Statement of Defence and Counter Claim. Subsequently, on 25th March, 2021 the Defendants filed an undated Amended Statement of Defence and Counter Claim. From the filed pleadings they stated that the Plaintiff obtained the registration of the Suit Property fraudulently because the Defendants were the original residents on the Suit Property and had never encroached on the Plaintiff's land. They held

that the Plaintiff never stayed, lived and/or being known to the Defendants. To them the said title was issued irregularly without consulting and/or considering the fate of the original residents who had lived on the Suit land from time immemorial and maintained potential, physical and actual control of the Suit land, the land being ancestral there being graves of great grand fathers/ mothers, coconut trees and other cash crops which most trees were over forty (40) years old.

23. Additionally, the Defendants asserted that they had set up permanent buildings thereon. To them the Plaintiff had conspired with some Government Officials and/or acted in bad faith and jointly with the Administration for their own selfish and financial gain to deprive the original descendants what was rightfully and entitled to them by *the Constitution* of Kenya.

24. To them the Suit Land had always been set aside as a settlement scheme by the Government for allocation to the Defendants who were occupants and whereas the Plaintiff had never been a resident hence the title deed thereof was unlawfully and fraudulently acquired and hence it was for cancellation. The Defendants held that the Plaintiff had neither incurred any losses nor damages on the Suit Land.

25. From the filed Counter Claim, at all the times the Defendants were legally and beneficially entitled to and were in actual occupation/possession of the Suit Property for many years. This included their parents who had been born there and had stayed there for over eighty (80) years without any interference and/or interruptions and continuously and had buried their loved ones on the land. They held that in the years of 1970s they approached the Government and subsequently it declared the whole of Suit Land as Kijipwa Settlement Scheme comprising of 500 acres and hence the land was held as Settlement Trust Fund in trust for the people residing thereon where each family was to be allocated at least 2.5 acres each. They had been waiting for this to happen until they saw the Plaintiff being allocated the title. They denied the Plaintiff ever lived on the Land. To them after conducting interrogation, they averred that they were illegally and irregularly classified as squatters on their own Suit Land and indeed they were faced with eminent eviction by the Plaintiff.

26. The Defendants reiterated that the Plaintiff acquired the title deed fraudulently and illegally based on the following particulars: -

    a. He illegally, irregularly and unlawfully in collusion with the Director of Land Adjudication and Settlement, the Chief Land Registrar and the Land Registrar Kilifi knowing well it was illegal;

    b. The Plaintiff had never been in occupation and/or possession while the Defendants had always been the residents of the Suit Land;

    c. Kijipwa Settlement Scheme was meant to settle the landless citizens who were then in physical and actual occupation of the Suit Land;

    d. The Plaintiff in collusion with other Government Officers and with impunity allocated the Suit Property to him against the general policy that each family was to be allocated 2.5 acres;

    e. Allocating over 100 acres to the Plaintiff instead of the public land without having any regard to the actual residents of the land and refusing to stay and/or suspending any transaction over the land from taking place including transfers and sub-divisions pending the land dispute, failing to effect directives in favour of the Defendants by the then Ministry of Lands;

    f. Taking part in and/or abetting corruption and/or corrupt practices in respect of the Suit Land;

g. Rendering the Defendants landless and homeless against the Government's effort to settle all people;

h. Taking a unilateral administration decision to allocate the Suit Property to the Plaintiff without according the Defendants an opportunity to present their case; and

i. Circumventing the very settled policy that settlement schemes were usually created for those intended to be settled and were in actual possession and occupation of the Suit Land contained in the scheme and that the same was not open for allocation to outsiders including the Plaintiff.

27. Hence the Defendants asserted that since the title deed was illegally and fraudulently issued to the Plaintiff the said registration should be revoked and/or cancelled, annulled and the same be registered in the names of the Defendants through rectification and amendment of the register under the Provisions of the law.

The Defendants were apprehensive that they were likely of being evicted from the Suit Land unless the orders sought by them were granted whatsoever.

For all these they sought for the following orders from the filed Counter Claim: -

a. Dismissal of the Suit by the Plaintiff with costs;

b. A declaration that the Suit Property was intended to and remained for the Defendants' benefit as settlement scheme taking that they had been actual and physical possession and occupation since time immemorial and that the allocation to the Plaintiff was illegal, fraudulent and irregular, unconstitutional and breach of trust and hence null and void;

c. A mandatory injunction be issued directing the Plaintiff to forthwith surrender the title deed for the Suit Property for cancellation and rectification and/or amendment of the register and have it sub-divided and issued to the Defendants;

d. A permanent Injunction be issued restraining the Plaintiff from undertaking any transacts thereon including sale, charges, leases, sub-divisions, taking possession, obstructing stopping interfering with the Defendants quite use, enjoyment, possession and occupation of the Suit Land; and

e. Costs of and incidentals to the suit.

V. The testimonial evidence by the Defendants.

28. On 13th October, 2022, the Defendants summoned Defendant Witness DW-1 who testified and closed his case on the said material day. He stated as follows: -

D. Examination in Chief of DW - 1 by M/s. Jadi Advocate

29. DW – 1 was sworn and testified in the Kiswahili language. He identified himself as Roy Kikalu Rimba a holder of the national identity numbers 4566639. A date of birth was 1.1.1948. He lived at Kijipwa within the County of Mombasa. He recorded statement on 23rd July, 2019. He relied on a list of Defendant's Document filed on 23rd July, 2019.

a. Letter dated 8th August, 1985 by proprietor – Defendants – Exhibit No.1

b. Letter dated 4th February, 2014 by claim the Land Commission Defendants – Exhibit No. 2

c. Letter dated 13th March, 2014 by he had an objection as the letter was not signed.

Court:- From the Lists of documents by the Defendants and there being an objection raised by Mr. Gakuo Advocate for the Plaintiff. M/s. Jadi Advocate for the Defendants opted to abandon the a Letter dated 19th November, 2015 –as the same never bore a signature.

However, the other documents were produced as evidence for the Defendants. These were:

d). A letter dated 4th May, 2016 - Defence Exhibit No. 3

e). Letter dated 16th November, 2016 by the Chairman the National Land Commission – Defence Exhibit No. 4;

f). Letter dated 24th January, 2017 from the CEO of NLC to the company of Kilifi..... – Defence Exhibit No. 5.

g). A Public Notice by National Land Commission issued pursuant letter dated 24th January, 2017 - Defence Exhibit No. 6.

h). An extract from the Kenya Gazzete dated 15th February, 2019 – Defence Exhibit No. 7.

i). An extract of the Report of illegal and Irregular allocation of land of the year 2014 – by the Ndun'gu Land Commission - Defendant Exhibit No. 8.

30. DW-1 stated being in Court having been sued by the Halai Brothers from the year 1996. When he got there, the Plaintiffs were never there until now. Kijipwa was a settlement Scheme. They started having discussion over the land dispute with the District Commissioner, Mr. Sam Tom and Mr. Okeyo. They went on live on the Scheme formally known as Kinamai Jeuri Kisama Cha Nyati. DW – 1 was born there in the year 1948. They never had any papers on the land. It was during the colonial times. They were not even allowed to plant trees. But their elders decided to engage the Government for it to consider giving the people the land. After Kenya attained independence, they still lived there. There were few scattered homes on the land. DW – 1 had lived there with the family.

31. The Elders never succeeded in getting land until they got involved. There were no numbers. The whole of the Kijipwa Settlement Scheme land was measuring 1,600 acres. But later on the SISAL VIPINGO estate took approximately 400 acres from it and hence remaining 1,200 acres. It's from these parcels of land that there were meetings held with the Government officials. Indeed, DW – 1 testified that it was agreed that each person be granted 2 ½ acres. People were allocated number. But later on they discovered that there were many people who had not been considered for the share of 2 ½ acres and while at the same time that title deeds had been allocated to other people who were not locals from the land. By the time of the allocation of these title deeds they were already in physical occupation of the land. Hence that was why the Defendants were in Court. DW – 1 was one of those persons who missed the 2 ½ acres intended shares. There were close to over 1000 people who were never allocated the said share of 2 ½ acres as had been intended. Out of the 1,200 acres that remained from the total 1,600 acres, the land was sub - divided into small portion of 8 parcels. Parcels No. 48 -50 from the document held by the National Land Commission it appear all these 8 parcels were further sub-divided and allocated to individuals.

DW – 1 and the other Defendants settled in Plot No. 48. They were in total over 100 people who settled on this Plot No. 48. He confirmed that they never got any Letters of Allotment nor any other documentations which conferred them ownership to the suit land. However, he testified that although he blamed the Government for not fulfilling their promise and responsibility of allocating them the Scheme but they had been working closely with the Government seeking for the ownership of the land.

They appeared before the the Ndungu Commission and the NLC over this issue. But there was no solution. These Government bodies only assisted them through convening of several meetings. They encouraged them. They informed them that the parcel No. 48 was theirs but it had been allocated to other people hence they should seek legal redress.

32. DW – 1 emphasized that the land was a settlement scheme. They were to be given 2 ½ acres each. But instead, the land was allocated to some other strangers – the Halai Brothers Limited. He wondered how this would have happened while to him the land was theirs. DW – 1 had never seen the Plaintiffs even one day. He had been sued by the Plaintiff on the grounds that they were trespassers and encroachers onto the land. Ideally, they would have liked to have them thrown out, while the Defendants remained. DW – 1 was claiming that the Plaintiff acquired the land illegally. He would want the title deed to be revoked. He didn't know how the Plaintiff acquired title deed. To him, the Defendants should be the ones to be given the land. They should be conferred the ownership of the suit land legally.

33. Before, the employees of Halai brothers Limited would be coming to them wanting to evict the Defendants. There was no space left on the land as each of the portion and space had been allocated and occupied accordingly. He wondered why an owner of land would be the one again to be suing the Defendants.

E. Cross Examination of DW - 1 by Mr. Gakuo Advocate: -

34. From the national identity, it indicated DW – 1 was born in the year 1948 at Kinamai. It does not mention Kijipwa. He stated that they had lived on the land from the time the Arabs got to the Coastal region. He was already there. He did not have any evidence such as photographs to show that he lived on the land. He denied they were squatters. DW – 1 confirmed having come from his home situated at the suit land - Plot No. 48. He never brought any photographs. He was a village Elder. He never had any knowledge on Land Surveying. Also that he never had any Surveyor's Report on the land to show that the land measured 1,600 acres and that the 400 acres was acquired by VIPINGO SISAL and the balance being 1,200 acres which was apportioned into 8 parcels including Plot No. 48.

35. He was referred to the Valuation Report from the Plaintiff's Bundle which indicated photographs of houses and plantation on Pages 20 - 34 by Tysons Limited. He informed Court that some people were given land while others were not. The 1,000 people were born there. They were not strangers nor visitors. Indeed there were some newly built houses by the people who were owners. He was not aware of land being sold/or selling of the land. But he knew that their grand fathers were born and buried there. He stressed not knowing how the Halai brothers got into the land. He could not remember being there when Mr. Mahindra the owner of the land acquired the land. He was not aware that the Plaintiff bought the land. However, he confirmed seeing the original Certificate of Title issued on 29th March, 1996 issued to the Plaintiff for all that parcel of land known as Land Reference No. KILIFI/KIJIPWA/48 measuring 19.59 HA and produced in Court as exhibit. Despite of this, DW – 1 still denied that the assertion by the Plaintiff that they bought land in the year 1996 and that immediately the land was invaded by the squatters. DW – 1 was further referred to Page 34 of the Plaintiff's documents being a copy of the official search – Plaintiff Exhibit - 3 dated 22nd July, 2005. He confirmed it showed as per 29th March, 1996, the land was legally registered to the Plaintiff.

36. He wondered how did the Plaintiff get the land that belonged to the settlement scheme. DW – 1 averred once more that he did not know how and from whom the Plaintiff bought the land from. DW -1 never brought any land. He confirmed that there were MAPs to show that they were in occupation of Plots No. 48. He was referred to Paragraph 9 of his witness statement. He confirmed that when the Plaintiff bought the land they co-existed peacefully. However, DW – 1 denied that when the Plaintiff bought the land, that there were no people on it. It was not vacant as alleged. The Defendants had filed

a Counter Claim demanding for land on behalf of other people. He never had a written authority to act on behalf of the other Defendants. He had 17 children. They all lived there. There were still many elders still alive such as Mr. Nicholas Mrima, Mr. Stanley Munga among others.

F. Re - Examination of DW - 1 by M/s. Jadi Advocate

37. The Defendants had been sued by the Plaintiff. It meant that they lived on the land. The Defendants were Roy Rumba and Roy Nyale Kahindi Ndogo on behalf of all the people squatting on the suit land Kilifi/Kijipwa/48. He was referred to Plaintiff's Bundle of documents – Plaintiff's Exhibit – 8 on the 2nd and 3rd Paragraphs of the Letter dated 15th April, 1996. The title deed was issued on 29th March, 1996 – By the time, the Plaintiff were getting the title deed, the Defendants were already in occupation on the land. This was even before he bought the land from Mr. Sassin. He was referred to the Land Valuation Report by the Tysons Limited. He did not know where the set of photographs on it were gotten from. It was dated 10th March, 2015. They were called by the National Land Commission at Watamu. He was referred to the Gazette Notice – which indicated the land was theirs. That is all. It marked the close of the case by the Defendants.

VI. Submissions

38. Upon the closure of the Plaintiff and the Defendants cases, the Honorable Court directed the Parties to file their Written Submissions accordingly within stipulated time frame. Pursuant to that all the Parties complied accordingly.

39. On 15th February, 2023, the Advocates were granted an opportunity to highlight their submissions. The Honourable Court wishes to once against express its gratitude to the Counsels, Mr. Gakuo and M/Jadi in the manner in which they diligently, devotedly and decently executed their tasks so effectively. This was from time of the Pre-trial conference to the hearing and now submissions. They were articulate, humble and resourceful. This court will retire and deliver its Judgment on short notice.

A. The Oral & Written Submissions by the Plaintiff

40. On 11th November, 2022, the Learned Counsel for the Plaintiff the Law Firm of Messrs. Muturi Gakuo & Kibara Advocates filed their Written Submissions dated even date. Mr. Gakuo Advocate commenced his submission by providing the Court with a detailed background of the matter. He stated that the Plaintiff sought for the orders as stated out from the Further Amended Plaint dated 19th May, 2017 and filed in Court on 23rd may, 2017. He asserted that the Plaintiff had proved its case, on Preponderance of probabilities. The title deed was issued based on fraud, illegally. His client proved how the property was acquired. PW – 1 produced Certificate of search to prove he was the legal owner. There was a Gazette Notice dated 21st May, 2017 produced in court to proof he had the property. Gazette is known by everyone.

41. The Learned Counsel added that PW-1 Mr. Halai Mahendra Harjik informed Court that he purchased the Suit Property from Ranjan Madan Gopal Sairi in the year 1996 for a consideration of a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs.3,500,000.00). To proof this PW-1 produced the title deed for the land, transfer documents and a copy of the cheque for the Purchase price, receipts from the Land Registry Kilifi, Stamp duty payment of Kenya Shillings Seventy Thousand (Kshs. 70,000.00) being 2% of the Purchase Price together with registration fees for Kenya Shillings Seventy One Thousand One Hundred and Seventy Five (Kshs. 71,175.00), a copy of the Kenya Gazette Notice for 21st May, 2017 proving ownership and the root course of the title deed to the Suit property. To buttress his case he relied on the case of "David Kiptugen – Versus - Commissioner of Lands & 4 others (2015) eKLR ".

42. The Learned Counsel submitted that there was no evidence which was tendered by the Defendants to proof that the previous registered owner had acquired the Suit Land illegally, un-procedurally or through a corrupt scheme. He held that the only evidence tendered by the Defendants was of historical injustices which were not pleaded hence, he argued that parties were bound by their own pleadings.

43. He emphasized that a title document would only be impeached if it was shrouded with fraud, illegally corruptions or misrepresentation or acquired un-procedurally. To support himself in this point the Counsel cited the cases of "Central Bank of Kenya Ltd – Versus - Trust Bank Limited & 4 others [1996] eKLR and "Eunice Grace Njambi Kamau & Another – Versus - The Hon. Attorney General and 5 others ELC suit No. 976 of 2012" which stated: -

> " A fraudulent conduct must be distinctly alleged and proved and cannot be inferred from the facts of the case". "..... fraud and illegal procedure must be proven beyond a balance of probabilities".

44. To the Counsel, he reiterated that the Plaintiff produced a Certificate of official search dated 22nd July, 2005 which search confirmed that indeed he was the registered owner of the Suit Property having purchased it from the previous registered owner. He never acquired it illegally or fraudulently. According to the Learned Counsel, the evidence of PW-1 was that when he bought the Suit Property it was vacant as otherwise he could not have purchase it. Further, that it was his evidence that it was after he purchased it that the Defendants invaded it and it was at that stage he decided to amicably settle the issue through the Chief's offices at Mtwapa since the Defendants were preventing the Plaintiff's contractor from fencing and clearing the Suit Property. The Counsel referred Court to the Chief's letter dated 22nd April, 1996 – Plaintiff Exhibit No. 9 where the Chief acknowledges the Land dispute between the owner and the squatters. Indeed, Mr. Roy Nyale the 2nd Defendant is a stranger in relation to the Suit Property.

45. With regard to the filed Amended Defence and Counter claim. The Defendants failed to demonstrate that they had been in occupation of the Suit Land for the period he alleged and the development undertaken thereon. The Learned Counsel's contention was that the Defendant ought to have adduced evidence in form of a report showing where their houses were, the coconut trees planted, the grave sites etc. The Defendant were not able to proof that they were in possession. They never produced any evidence where the graves and Coconut or Semi permanent and ongoing premises and the school. There were fresh constructions. It came out these were professional squatter. The Plaintiff had demonstrated that he was the legal owner based on Article 40 (1) of *the Constitution* of Kenya. The plaintiff has proved he was the bona fide owner of the property. He established the root of title. The Plaintiff invited the Court to go and see the property. The arguments that the Plaintiff was an employee of the Ministry of Lands was evidence from the bar. He urged Court to disregard it.

46. On the contrary, the Learned Counsel alleged the Defendants were professional squatters who were engaged in grabbing peoples land. Indeed, the Plaintiff was not able to disapprove nor corroborate the evidence by experts Tyson Ltd through their Valuation Report dated 15th March, 2015 Plaintiff Exhibit No. 10 on page 20 which was able to proof the following: -

    a. That on the Suit Property, there was a Semi complete permanent houses;

    b. Ongoing construction of permanent house;

    c. Piped water within the Suit Premises supplying third party sub-plots;

    d. A school within the Suit Property;

e. Construction materials for new construction on a sub-plot; and

f. Temporary third party structures on the Suit Property.

The Learned Counsel submitted that the Defendants failed to prove their Counter Claim. He asserted that parties were bound by their own pleadings. The historical injustices were never proved. There was no expert called. The contents of Paragraphs 18, 19, 24 and 27 of the submissions were evidence from the Bar. Their other party who were to have adduced evidence failed to turn up. The Defendant never called relevant witnesses to prove their case instead of adducing the evidences in their submissions allegations.

47. Additionally, the Learned Counsel held that the Defendant failed to proof the particulars of fraud as demonstrated from numerous Court cases where fraud has not only to be specifically pleaded but also proved beyond the balance of probabilities. The allegations of fraud ought to be proved. This was not proven in their counter claim. In the instance case, the Learned Counsel held that the Defendants failed to discharge that burden of proof bestowed on them. Further, the Defendants failed to proof the evidence tendered of historical injustice and neither was it pleaded.

48. Further, the Defendants never produced any report to demonstrate there had been any collusion or fraudulent action as claimed in the counter claim and hence the said prayer should be dismissed with costs. The document produced by the Defendants never proved that the Plaintiff's land was illegally allocated to the previous registered owner who sold it to the Plaintiff, the verdict by the National Land Commission confirming that the Suit premises was irregularly allocated, in fact the Kenya Gazette Notice dated 1st May, 2017 produced in evidence by the Defendant confirmed that the Suit Property was allocated to Mr. Randan Gopel Saini which further proved the root cause of the title deed held by the Plaintiff.

49. In conclusion the Learned Counsel urged Court to dismiss the Amended Counter Claim by the Defendants and enter Judgment for the Plaintiff as prayed in further Amended Plaint. To support his case PW-1 produced the following documents: -

a. A copy of authority of the Company to institute the Suit;

b. A copy of the Certificate of title deed;

c. A copy of the Certificate of the official search;

d. A copy of the transfer of land dated 29th March, 1996;

e. A copy of the Cheque dated 13th May, 1996 for a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000.00);

f. A copy of the cheque and receipt no. C868630 for Stamp duty;

g. A copy of a letter to the Contractor dated 9th April, 1996.

h. A copy of a letter dated 22nd April, 1996 to the Chief;

i. A copy of the Valuation Report by Tyson Ltd dated 15th March, 2015;

j. A bundle of receipts; and

k. A copy of the official search dated 23rd January, 2018.

B. The Oral and Written Submissions by the Defendants

50. On 18th November, 2022, the Learned Counsel for the Defendants the Law firm of Messrs. Madzayo Mrima & Jadi Advocates M/s. Jadi Advocates commenced her Written Submissions by providing the Honorable Court with a full detail of both the Plaintiff and Defendants' case as clearly stipulated in the further Amended Plaint, Defence and Counter claim thereof.

51. To further advance her submissions the Learned Counsel relied on the following three (3) broad issues to be considered by the Honorable Court. These were: -

Firstly, whether the Suit Property herein formed part of the Kijipwa Settlement Scheme for settlement of the locals settlers and whether the Plaintiff acquired a valid title deed. According to the Learned Counsel Settlement Scheme were government initiatives for providing rural development by providing small farmers with resources and land for subsistence and commercial farm operation and to increase the standard of living among rural communities in a cost effective manner.

According to the Counsel the Suit Land was a settlement scheme having been declared so by the Government as shown from the letter dated 8th August, 1985 by the then proprietor of the land and the proprietor of Plot No. 43 produced by the Defendant as Exhibit No. 1. The said letter had also been received at the District Settlement Officer's office as per the receiving stamp dated 13th August, 1985. She observed that from the letter by the proprietors they stated and requested for assistance from the offices of the Director of Settlement "In moving the genuine squatters to their plots and evict the illegal squatters....." where to her it implied there were people in occupation of the Suit Property as at the year 1985 whom to her were the Defendants.

52. The Learned Counsel provided an elaborate procedure for one to acquire a parcel of land in a Settlement Scheme. These were: -

a. Upon declaration of the settlement scheme by the Court, the Government dispatches its officers to the area as Fund Trustees to manage the scheme;

b. The Officers are then tasked with the identification of the people on the area with the help of the local administration;

c. Depending on the size of the land they determine the size of land each settler is to get;

d. The Officers then undertake demarcation, allocation of the parcels of land, planning of the scheme and the issuance of the offer letter to the settlers offering them the land at a small fee;

e. Upon acceptance, an allotment letter is issued to the person and a charge drawn against the allotment letter whereof the allottee commits himself that he shall pay the loan amount as indicated in the charge;

f. The loan amount is payable within several years and it is upon final payment that a Discharge of Charge is then prepared whereof one is discharged from any liabilities to the settlement fund trustees; and

g. The Applicant then forwards all the documents which include the allotment letter, the receipt for payment of the charge amount, the discharge of charge among other documents to the Ministry of Lands and a title deed is produced in favour of the person/allottee.

53. From these, and applying the same to the instant case none of the previous proprietors of the Suit Land nor the Plaintiff followed these procedures nor document existed to have attained the title as alleged by them.

Besides, assuming these documents existed, the Defendants were already in occupation before the embarking on pursuing the Government to declare the entire land a Settlement Scheme and hence they were the rightful persons to be allocated the land from the year 1982.

54. In a nutshell the Learned Counsel contended that the issuance of the title to the previous proprietor and the Plaintiff was illegal, fraudulent and irregular. Further the testimony of the PW-1 contradicted the contents of the letter dated 8th August, 1995 by the previous proprietor and that of the Chief letter dated 15th April, 1996 Plaintiff Exhibit No. 9 which confirmed that there were people occupying the land even before the allocation of title deed.

The Learned Counsel argued that if the Plaintiff was an innocent purchaser for value why was he pursuing the issuing of removal of the illegal squatters from the land through the Chief's office and not Mr. Rajan Madan Gopel Sairi - the Vendor. It also showed that the Plaintiff had never conducted due diligence before purchasing the land through his letter to the Land Control Board dated 25th April, 1996 he seems to fault the squatters and in that case he should not have bought the land altogether.

Clearly, the Plaintiff was not an innocent purchaser for the value as he already knew and was aware of the existence and occupation of the land by the Defendants.

Further, it was established that the predecessor was an officer at the Ministry of Lands which confirmed the allegation of the collusion between him and the other land government officials. The Predecessor took advantage of his position at the Land Department and in collusion with other land officials allocated himself the Suit Land and seeing he was unable to sort out the issue of the residents who had already settled on it he quickly transferred it to the Plaintiff herein.

The Learned Counsel also emphasized that Kijipwa area had been declared a settlement scheme and it was the responsibility of the Government to ensure it was properly surveyed, allocated to the Defendants and title deeds issued to them.

55. Therefore the conclusion was that the title deed was acquired illegally, irregularly and through fraudulently means and hence should be cancelled and/or revoked henceforth. To buttress on this point the Counsel cited the case of: - "Dennis Kuria & Anor –Versus- The Attorney General, High Court of Kenya (Nbi) in Misc Civil Application No. 663 of 2006" where the Court held: -

> " I find that history is very relevant to enable the Court establish whether or not the allotment of the Suit Land to the Petitioners or the issuance of the titles is legal. The fact that the Respondents did the allocation does not confer legality to the title as the same was unconditional".
>
> The Counsel argued that the title deed here was not first registration hence indefeasible and could be revoked or nullified. The Plaintiff failed to produce the green card to show the history of the land nor summon the Land Registrar to affirm proprietorship details.

To support her point of argument she relied on the Provisions of Section 26 of *Land Registration Act* No. 3 of 2012 and the cases of "Alice Chemutai Too –Versus- Nickson Kipkurui Korir & 2 others (2015) eKLR; William S. K Ruto –Versus- The Attorney General HCC No. 1192 of 2005 (Nbi) & Silas Moke Otuke –Versus- The Attorney General & Other (2014) eKLR". She held that the National Land Commission was aware of the issue as seen from the letter dated 16th November, 2016 Defendant EX-No.4.

56. Secondly, the Learned Counsel posed on whether the Defendants herein were entitled to the use and occupation of the Suit Property. She affirmed that the land was Settlement Scheme and that the Defendants were already in occupation since time immemorial all the time when they pursued the

Government to allocate it to them. Hence the allocation to the predecessors and the Plaintiff were illegal and irregular.

She held that from the documents produced by the Plaintiff they had no relationship with the Suit Land. For instance Plaintiff EX-12(a) to (d) being receipts from the National Water Conservation and Pipeline Corporation which indicated they were house/flat C which the Plaintiff never managed to put up any houses on the Suit Property and the alleged water connection which never existed hence a clear indication the Plaintiff came to Court with unclean hands and contrary to the legal Maxim of "Ex-Turpi Causa non Oritur Actio" a legal doctrine which stated that a party will be unable to pursue a legal remedy it arises in connection with his own illegal act. While on the other hand the Counsel argued that the Defendant who was born in the year 1948 had been in occupation of the land for over twelve (12) years required by law.

57. Thirdly, the Learned Counsel was of the view the Plaintiff in the counter claim were entitled to remedies already set out in the filed counter claim being the Suit Land based on the implied or constructive trust in their favour pending the survey and allocation exercise. The Court should order for the cancellation of the title deed held by the Defendant in the Counter claim and order the 2nd to 8th Defendants in the Counter claim to register and issue title deed to the Plaintiffs in the counter claim. On this point the counsel cited the case of "Adan Abdirahani Hassan & 2 Others v. The Registrar of Titles [2013] eKLR".

58. Whereby the Court held where land was for public purposes, such title did not exist and was not available for alienation as it belonged to the public and it should never have been issued in the first place.

In conclusion, the Learned Counsel urged Court to dismiss the suit filed by the Plaintiff and allow the Suit Land by the Defendants through counter claim with costs.

To support their case they relied and produced the following documents: -

a. A copy of a letter dated 23rd July, 2019;

b. A copy of a letter dated 8th August, 1985 by the proprietor to the Director of Settlement Scheme;

c. A copy of a letter dated 4th February, 2014 by the Chairman of National Land Commission;

d. A copy of a letter dated 13th March, 2014;

e. A copy of a letter dated 19th November, 2015;

f. A copy of a letter dated 4th May, 2016;

g. A copy of a letter dated 16th November, 2016;

h. A copy of a letter dated 24th January, 2017 from the CEO National Land Commission to Land Adjudication Office, Kilifi;

i. A copy of a public notice by the National Land Commission dated 24th January, 2017;

j. An extract from a copy of the Kenya Gazette Notice dated 15th February, 2019; and

k. An Extract from the Report of illegal & irregular allocation of Public Land (The Ndungu Commission) of 2014.

VII. Analysis and Determination

59. I have fully assessed all the filed pleadings in this case being the further Amended Plaint and the Amended Defence and Counter claim by the Defendants herein, adduced evidence by the summoned witnesses, the written authority and the plethora of authorities thereof by the parties herein, the relevant Provisions of *the Constitution* of Kenya, 2010 and the Statutes.

60. For the Court to arrive at an informed, reasonable, just and fair decision in this matter the Court has crystallized the subject matter herein into the following four (4) broad salient issues for determination. These are: -

    a. Whether the suit filed by the Plaintiff through the Further Amended Plaint dated 19th May, 2017 is meritorious.

    b. Whether the suit filed by the 1st and 2nd Defendants through the undated Amended Defence and Counter Claim filed on 25th March, 2021 meets the threshold on the Claim of land through the Doctrine of Land Adverse possession and Settlement Schemes as depicted from the relevant statutory provisions in Kenya.

    c. Whether the parties herein are entitled to the reliefs sought from the filed pleadings; and

    d. Who will bear the costs of the suit?

ISSUE No. (a) Whether the suit filed by the Plaintiff through the Further Amended Plaint dated 19th May, 2017 is meritorious.

Brief facts

61. Before embarking onto the analysis of framed issues herein, the Honourable Court feels it imperative to extrapolate on the facts of the case but briefly. However, it has been noted that this proceedings have been elaborate and in-depth, hence the Court will not want to belabor the point on too much and unnecessary details of the matter. Nonetheless, for clarity sake, from the filed pleadings the Plaintiff claims to have legally and regularly acquired the Suit Land from a predecessor on Mr. Rajan Madam Gopal Saini in 1986 who had been a first registration owner. It is not clear when Mr. Sasini had gotten it. He did fully comply with the due diligence by obtaining the Letter of consent from the Bahari Land Control Board, transfer form and paid Stamp duty and subsequently was issued with the Certificate of title deed. To him the only remaining issue was to have had the squatters evicted from the land as they had been interfering with their development. He noted this when their contractor had undertaken to develop a perimeter wall and was met with hostility. He denied that his title deed was acquired fraudulently and irregularly as alleged.

62. On the other hand, the two (2) Defendants held emphatically they had been in occupation of the Suit Land from time immemorial to date. DW-1 was born in 1948. The same had been declared Kijipwa Land Settlement Scheme by the Goverment where they were entitled to at least 2.5 acres each. To them the land was theirs and being public land it was not available for allocation to anyone including the predecessor who they claim had been working as a staff at the Ministry of Land and the Plaintiff. Thus, they strongly submitted that the title deed to the Suit Land was acquired illegally, fraudulently and wrongly and hence to them it ought to be annulled, revoked and/or cancelled and subsequently the land be registered in their names accordingly. Additionally, they had pleaded to be granted title deed through the doctrine of Land Adverse Possession and under the Settlement Scheme program.

63. Additionally, it is significant to note that on 13th October, 2023 by a mutual and consensus of the parties, the Court conducted a a very successful Site Visit ("Locus in Quo") on the land. It was based on the provision of Section 173 of the *Evidence Act* Cap. 80 and Order 18 Rule 11 of the Civil procedure Rules, 2010. Below is the full Site Visit report.

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

SITE VISIT ("Locus in Quo") HELD AT NGOLOKO VILLAGE PLOT NO. KILIFI/KIJIPWA/48 IN KILIFI COUNTY ON 13TH OCTOBER, 2023 AT 10:40

I. Introduction

1. The Site Visit "Locus in Quo" was held pursuant to a "Suo Moto" decision made by this Court after the close of the Case by the Plaintiffs and the Defendant herein. In the process of penning down the Judgement, it became imperative for the Court to conduct this Site Visit.

2. On 28th September, 2023 the Honorable Court caused this matter to be mentioned. In the presence of all parties, revolving around the provision of Section 173 of the *Evidence Act*, Cap. 80, there was consensus that the site visit be conducted on 13th October, 2023 at 9.00am. Pursuant to that all security arrangements were made accordingly.

II. Present members: -

A. Court:-

1.Hon. Justice L.L. Naikuni, Environment & Land Court, No.3;

2. M/s. Yumna (Court Assistant).

3. PC. George Omondi (Usher);

4. Mr. John Mwaniki (Driver).

B. Plaintiff:-

3. Mr. Gakuo Advocate for the Plaintiff. He was accompanied by the representative of the Halai Brothers Group Company Limited. Mr. Ahmed Sheikh Amin Mselem

C. Defendant:-

4. M/s. Farida Jaddy Advocate for the Defendants. She was accompanied by Mr. Nicholas Mrima, Mr. Roi Rimba, Mr. Gillian Ndosho' Mr. Focus Munga and approximately some other 50 more people.

D. Security operatives

1. Sergeant Meshack Gitonga;

2. P.C Caleb Mutai.

3. P.C Susan Mungai;

4. P.C Clemence Njumwa;

5. Corporal Juma Ali (Kijipwa driver)

E. Village elders (Wazee wa Mtaa)

1. 12. Roy Rimba;

2. 13. Daniel Tokali;

III. The Procedure:-

Mr. Gakuo:-

I apologize on behalf of my colleague Ms. Farida Jadi for being late.

M/s. Jadi

I request one party from both sides to represent to lead us (Nicholas Mrima and Sheikh Amin)

IV. Observations

The team upon walking around the whole parcel of land made the following observations. These were:

a. The suit land is known as Land reference numbers Kilifi/Kijipwa/48. It measures 19.89 HA (Approximately 50 acres). It is rectangular/hexagon in shape and on a flat area. From it there were grown several mangoes, coconut, baobab, paw paw, banana tree plantations and other vegetation, which was an indication of the place being fertile. The land approximately 4 Kilometers to the Indian Ocean.

b. There are some old 30 graves both cemented and non-cemented which are approximately set aside at the far corner of the suit land.

c. There were several semi-permanent mud walled and makuti thatched houses spread out all over the suit land (Close to 40 to 50).

d. A general observation was that it appears the land is already occupied by over 100 people. Although there are no clear papers to guide allocation, but from the make shift fences on each compound there were some permanent and semi-permanent structures in form of homesteads, religious shrines such as churches and schools. it was a clear indication the place was heavily habited.

e. There are some nicely demarcated access roads leading to the various home steads. The team was able to pin point and easily identified well already constructed while others still newly undergoing construction of permanent Manssionate and bungalows with well manicured compound and gates. Some of those properties were owned by the following:- Mr. Kadenge, Mr. Cyrus Mazera, Mr. Moses Kombe, Mr. Gillan Albert, Mr. Mrima Mr. Lazarous, Mr. Mbaluka, Mr. Roy Rimba, M/s. Mary Mudzomba, Mr. Timothy Kalo, Mr. Erick Dondo, Mr. Brown Dalla Kalu, Mr. Denis Pole and M/s. Rahel Chibo. The team learnt that some of these owners were aboard working on temporary assignments such in acrobatic world and they would be sending finances for these development to be undertaken on their behalf by their relatives who were still around.

f. The team visited a full fledged basic educational institution. It comprised of Ngoloko primary school; with nursery and a junior secondary school. We were informed it had an approximate 380 pupils.

g. The team also visited another private primary school registered in the name "Dream Land Academy". We learnt that it accommodates mainly orphans. It had approximately 100 pupils. It was adjacent to Plot numbers 48, 43, 53 and 96. There was a well constructed house between Plot numbers 48 and 53.

h. However, as the team never wanted to interrupt the daily businesses of the day and also to avoid creating any anxiety and be in conformity with the objective of the site visit as stated above, it did not hold any conversation with any of the leaders managing the institutions.

i. There were several churches on permanent structures. For instance, Upendo Baptist church, Mto wa Uzima church and a PAG Church. From this, the team would easily conclude that the majority of the inhabitants on the suit land were of Christian denominations and worshippers as opposed to being Muslims.

j. The place is well connected with electricity as could be seen from the electrical poles. There are also several shallow water wells and bore holes supplying the inhabitants with water for human consumption.

k. Across the plot there is a tarmac road and the opposite side is well gated palatial Sultan Palace apartments for the upper middle class.

The estimated Valuation

The team concluded that there was a heavy investment made on the land from the structures on it.

The team made an attempt to cause the valuation of the land and development thereon. It was informed by several factors. These were:-

a. It is approximately 30 to 40 kilometers away from the Mombasa main land town.

b. The land is approximately five kilometers from the said Mombasa – Malindi main road.

c. It is well connected by a neat 12 meters tarmac road.

d. There are electricity and water supply.

e. It is next to the well-constructed and palatial Sultan Palace apartments and the beach.

f. It is approximately 4 Kilometers from the Indian Ocean.

g. It is highly in demand at the market view point.

h. It is adjacent to other plots – Nos. 38, 39, 41, 53

Therefore, based on all these considerations, by approximation and estimation, the total valuation of the land and the development would assessed and estimated to the following amount:

a). The parcel of land was valued approximately (on estimation) at a sum of Kenya Shillings twenty Million an acre (Kshs. 20, 000, 000.00) being the market value. Hence a total of a sum of Kenya Shillings One Billion (Kshs. 1, 000, 000, 000.00/=).

b). The development would be valued at a sum of Kenya Shillings Five Hundred Million in total (Kshs. 500, 000, 000.00) hence a total value be a sum of Kenya Shillings One Billion Five Hundred Million (Kshs. 1, 500, 000, 000.00/=).

V. Remarks

The team noted that the Community had a good mutual and cordial relationship between themselves and the Plaintiffs. This was seen from their interaction with the Plaintiff's representatives present Mr. Mrima confessed having been sponsored by the Plaintiff in his Political Campaigns as an MCA.

Mr. Mrima

We are happy the court decided to come and see the ground and on behalf of the locals we say thank you to the court.

Mr.Gakuo:-

Mr. Gakuo asked the villagers who sold the land to the people who are constructing and Mr. Mrima confirmed most of the people who are constructing are acrobats and the locals kids who have travelled to Saudi Arabia to work and are all locals.

Ms Jaddy:-

- I appreciate the court for coming and we are grateful for that.

The site visit ended at 11.35 A.M. with a word of Prayer by Mama

Racheal

SITE VISIT REPORT PRESENTED ON THIS 13TH DAY OF OCTOBER 2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT MOMBASA

This is adequate of the brief facts.

64. Now turning to the issues under this sub – heading. As indicated, this is a rather complex and convoluted matter where the main substratum of it is on the legal ownership to the suit property and compensation of the parties herein. From the very onset, the Honourable Court wishes to underscore on two issues the historical land set in Kenya and the Doctrine of the Burden of Proof the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

65. In law, the term is encapsulated for by the provision Section 107 of the *Evidence Act* Cap 80 laws of Kenya which provides as follows:-

> " 107 Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In other words, he who alleges must proof.

66. In furtherance to this Lord Denning J. in the case of "Miller – Versus - Minister of Pensions (1947) 2 ALL ER 372", discussing that burden of proof had this to say:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.
>
> Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

67. I have noted that the Certificate of Title Deed for the suit land here was issued in the year- 1980's – to the predecessor and the Plaintiff on 29th March, 1986 under the Registered *Land Act*, Cap. 300 (Now Repealed). Thus, the relevant provisions would be Sections 27, 28 and 143 of the RLA to wit:-.

Section 27(a) "Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"

Section 28 of the Act provides that:-

> " The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."

Section 143 (1) of the Act provides thus:

> " Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake
>
> (2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in

consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default"

65. However, considering that the Registered *Land Act*, Cap. 300 Act has now been repealed, based on the saving Clause under the provision of Section 107 of the *Land Registration Act*, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the *Land Registration Act*, No. 3 of 2012 and the *Land Act*, No. 6 of 2012 and which I will be dealing with in a more elaborate manner later on. This Legal position finds grounding in the provisions of Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

" Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed"

The said legal position was upheld in the cases of "Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR" .

There are two (2) broad grounds upon which forms the pith and substance of this matter on the one hand the ownership of the land by the Plaintiffs and the claim by the Defendants to the land.

68. On the one hand, in the instant case, thought queried by the Defendants the Plaintiff claim to have acquired the title from purchase for value from one Mr. Ranjan Madan Gopal Saini where all the due diligence and process was followed to the letter and eventually a Certificate of Title was issued in his names on 29th March, 1996. From the official conducted on 22nd July, 2005, it confirmed and indicated the suit land was still registered.

69. The Plaintiff has emphatically held having as an innocent purchaser for notice and value bought it from a previous registered owner. He has demonstrated the process of the purchase and with supporting documents up to attaining conclusive "prima facie" evidence in form of a Certificate of title deed. His main concern is that he is not able to access to the Suit Land as proprietor due to the presence of squatters the Defendants. It's for this reason through a letter dated 8th August, 1995 he sought the assistance of the local Chief and also instituted this suit.

70. While the other hand, the Defendants through the Counter claim, they have claimed land adverse possession and waiting to be issued with title like all the other local residents measuring of 2.5 acres from the Kijipwa Settlement Scheme by the Government having lived there from time immemorial. But while waiting for this to happen, they found out the Plaintiff had been allocated title which they have emphatically challenged with strong grounds and particulars of fraud and illegality being collusion of the Land Government Officers into land that was not available for allocation being public land.

71. In order for this Honorable Court to effectively deal with the afore stated the two (2) issues, I wish to commence by citing the provisions of Sections 7, 24, 25 and 26 (1) of the *Land Registration Act* Verbatim as follows:-

According to the Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

S. 7 Title to land may be acquired through:-

i. Allocations;

ii. Land Adjudication process;

iii. Compulsory acquisition;

iv. Prescription;

v. Settlement programs;

vi. Transmissions;

vii. Transfers;

viii. Long term leases exceeding Twenty one years created out private land; or

ix. Any other manner prescribed in the Act of Parliament.

The registration of person as a proprietor vests in them the absolute rights and privileges.

Section 24. Subject to this Act:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

(1)"The rights of proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register".

However, this registration of land is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures as stated out under the provision of Section 26(1) of the *Land Registration Act*, No, 3 of 2012.

According to the provision of Section 26 (1) of the *Land Registration Act* (2012), it provides as follows:

" A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.

Section 26(2) provides that

> " certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original".

72. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions. That is to say, this is where the Certificate of Title is doubtful, suspect or obtained by fraud or forgery un-procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above provision of Section 26 (1) of *Land Registration Act*, No. 3 of 2012. See the cases of "Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR and Alice Chemutai Too – Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR", where the Court held that:-

> " It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme
>
> I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists."
>
> When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of "Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR", where the Court held that;
>
> > "A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

73. Indeed, these are extremely genuine concerns and need to be critically addressed specifically but in a case by itself. These were not the matters before this Court. That is the pith and substance of this

Judgement. To do so, the Honourable Court is guided by the Court of appeal in the case of: "Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239 of 2009", the Appeal Court held that:-

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."
>
> It follows therefore that, if the Court is satisfied that any registration was obtained, made or omitted by fraud or mistake, has the legal mandate under the provision of Section 80 (1) of the *Land Registration Act* to cause the title deed be cancelled or amended or annulled or revoked. Section 80 provides that:-
>
> "Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."
>
> Sub section (2) states that:
>
> "The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake."

74. From the filed Amended Defence and Counter Claim in the instant case, the Defendants have challenged the title held by the Plaintiff. The only assertion made repeatedly by the Defendants was that the Plaintiff working closely and collusion with the Government officials obtained the Certificate of title fraudulently. Indeed, the Defendant have urged the Court to grant orders for the title to be impeached or annulled.

75. Firstly, the Plaintiff has shown Court "the prima facie" evidence in form of a Certificate of title deed and all the other documents on the process of how they acquired it. Based on the Provisions of Sections 7, 24, 25 & 26 (1) of *Land registration Act*, 2012 and Article 40(1) of *Constitution of Kenya, 2010* the Court is satisfied that the Plaintiff has good title deed. Flowing from that and pursuant to the provisions of Article 40 (1) and (2) of *the Constitution* of Kenya, 2010 and Sections 24, 25 and 26 of the *land Registration Act*, No. 3 of 2012 that he was the absolute and legal registered owner to the land with indefeasible interest, title and right vested on him by law. The effect of the registration of Land is founded in the provisions of Section 24 of The *Land Registration Act*, No. 3 of 2012. This fact is strengthened by the following decisions - the Supreme Court in Supreme Court Petition No. 8 (E010) of 2021 - "Dina Management Limited – Versus – County Government of Mombasa"; Supreme Court Petition No. 5 (E006) of 2022 – Torino Enterprises Limited - Versus – Hon. Attorney General"; "ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and "ELC (Chuka) No. 110 of 2017 – M'Mbaoni M'Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – 'Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua' where courts has held that:-

> 'It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.'
>
> In the case of "David Peterson Kiengo & 2 others others – Versus - Kariariuki Thuo (2012)eKLR" where it was observed that:

".....Indefeasibility of title is the basis for land registration. The state maintains a central register of land title holding which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring interest."

76. Secondly, taking that the though its pleadings and evidence in Court, Defendants have challenged the Certificate of Title Deed held by the Plaintiff based on grounds of it having been obtained through fraudulent means and collusion, it behaves logic that the Honourable Court expends a little bit of time on theses allegations. According to the Black's Law Dictionary, defines fraud as follows:-

> " Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional . As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

77. I reiterate, it is trite law under the provision of Sections 107 to 112 of the *Evidence Act*, cap. 80 provides:-

Evidence Act Section 107, 108 and 109 provides as follows;-

"Section (107); Burden of proof.

(1); Whoever desires any court to give Judgement as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exists.

(2); When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section (108); Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section (109); proof of particular fact.

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence. Unless it is provided by any law that the proof of fact shall lie on any particular person.

78. Meaning that he who alleges must proof. It follows that the Defendants have a duty to proof the fraud and misrepresentation allegations that they have cited against the Plaintiff. The Learned Counsel for the Plaintiff submitted that that burden has not been discharges at all. The Defendants relies on their pleadings filed in court, in particular the Counter Claim. The Learned Counsel reiterated that the was a bona fide purchaser for value without notice of any fraud and/or misrepresentation.

79. The holding of A Visram J in the case of "Gladys Wanjiru Ngacha Versus - Treresa Chepsaat & 4 Others (2013)eKLR", he held that;

> " It is not enough for the Appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga – Versus - Nyati (1984) KLR 425,at p.g. 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact". We find that the appellant did not prove fraud on the part of the respondents".
>
> In addition to the above authority of "Gladys Wanjiru (supra)", the case of "R.G. Patel -vs- Lalji Makani" is cited where the court held that;
>
> "Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."
>
> I am compelled to refer to the case of"- "Central Bank of Kenya – Versus - Trust Bank Ltd & 4 Others (1996) eKLR", where the Court had this to say:-
>
> "The appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in any ordinary civil case.
>
> In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence upon which the court would make a finding."
>
> In the case of:- "Flectcher – Versus - Peck as cited in Eunice Grace Njambi Kamall & Another- Versus - The Attorney General & 5 Others" Marshal J. had this to say:-
>
> "If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him."
>
> "Mbiiri Kamau (Representing A.C.K Kitharaini Church, the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya) -Versus - Munyangia Njoka & 2 Others".

The Court of Appeal decision in the case of "Kuria Kiarie & 2 Others – Versus - Sammy Magera (2018) eKLR",as cited in Dixon Okindo case, held that;

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo_- Versus – Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that: "...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the Dixon Okindo Mageto & another – Versus - Dinah Mageto that required in ordinary civil cases, namely proof upon a balance of one beyond a reasonable doubt as in criminal cases." "..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

Further in the case of: "Joyce Kemunto Osoro (suing as the legal representative of Stephen Obonyo-deceased) – Versus - Attorney General & 9 Others (2020) eKLR" where the court held that;

> " The title in the hands of an innocent third party can be impugned under Section 26 (1) (b) of the *Land Registration Act* if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme".

80. Based on the surrounding facts and inferences of this case and above comprehensive analysis, the Honourable Court is fully satisfied that there was no basis was ever laid to convince court on the Plaintiff having acquired the Certificate of Title Deed through Collusion with the Government officials and fraudulent means. The Defendants failed to provide any empirical documentary or otherwise evidence to demonstrate that the Plaintiff participated in the conspiracy. For instance no proper investigation report from the D.C.I land fraud unit was ever produced.

81. Thirdly, having stated that, the Honourable Court wishes to deal with the issue of the purchase of the suit property. The Black's Law Dictionary 8th Edition, which defines "a bona fide purchaser" as:

> " one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims"
>
> A bona fide purchaser of land has absolute and unqualified and answerable defense against a claim of any prior equitable owner.

On this point, I wish to cite the now famous decision of "Katende – Versus - Haridas & Co. Ltd (2008) 2 EA" the Court of Appeal of Uganda stated that a bonafide purchaser was a person who honestly intended to purchase the property offered for sale and did not intend to acquire it wrongly. That for a purchaser to successfully rely on this doctrine, he must prove that:

a. He holds a certificate of Title.

b. He purchased the property in good faith.

c. He had no knowledge of the fraud.

d. He purchased for valuable consideration.

e. The vendors had apparent valid Title.

f. He purchased without notice of any fraud.

g. He was not party to any fraud.

The Honourable Court wishes not to belabor on this point. The Plaintiff has already demonstrated how he purchased the suit property and the due process he pursued. For these reason, therefore, the Court concludes that the Plaintiff attained this property as a bona fide purchaser for value and hence he is the registered and absolute owner of it with indefeasible title, rights and interest vested in him by law as a purchaser for value on notice.

82. Fourthly, now turning to the two issues a claim of title on settlement scheme as promised by the Government as alleged by the Defendants and the land adverse possession. On the settlement scheme. Settlement programs were created in an effort to settle displaced individuals or to cater for landless families and squatters as well as ease the burden of population growth in the native reserves. Moreover

these schemes sought to increase agricultural production and the furtherance of rural development. There was no codified law regarding the creation of settlement schemes prior to the enactment of the *land Act* No. 6 of 2012. According to the case of "Chengo Katana Koi – Versus Protus Evans Masinde" (2013) eKLR Malindi and Raphael Kariuki Gichuki – Versus – Peter Maya Gichuki (2019) eKLR (Kerugoya (ELC) there was and should be established Settlement Scheme Trustee Fund under the provision of Section 168 of the Agriculture Act used for the purchase of land for resale to settle land less persons. The provision of Section 134 (1), (2), (4), (5), (6) and (7) of the *Land Act*, No. 6 of 2012, the Government of Kenya, the National Land Commission and the County Government are mandated to create a settlement programs for settlement of the landless persons, squatters, displaced by natural causes, development projects, conservation, internal conflicts or other causes that may led to the movement or displacement.

83. In the instant case, DW – 1 as the sole witness for the Defendant, testified that he was born in the year 1948 at Kijipwa area of Kilifi County. According to him, the area was measuring approximately over 1, 600 acres and that the area had not been surveyed and/or allocated to any persons by then. He testified that in the year 1980's, him together with other residents had several meetings with the then Moi Government in an effort to have the entire area of Kijipwa declared a settlement scheme and for the Government to settle the locals and issue them with title deeds for the Land. According to the witness, the Government heeded to their call and the entire area was declared a settlement by the name Kijipwa Settlement Scheme and a committee was placed by the Government to ensure that the land was surveyed and the locals settled with each family being allocated a portion of two and half (2,5) acres. DW – 1 further stated that as they were awaiting survey exercise of the land and allocation of land by the Government, they were surprised to learn that the allocation of the scheme had already been done and title deeds had been issued to several people whereof the position that he and other residents had settled in was allocated Plot Number Kilifi/Kijipwa/48 measuring 50 acres. DW – 1 questioned the manner in which the scheme was allocated and the legality of the several title deeds which were issued to people who had never been residents of Kijipwa area. He also questioned how the Plaintiff and/or its predecessor in title managed to obtain a title deed for fifty (50) acres despite of the laid down policy that each occupant was to be allocated two and half (2.5) acres of land. DW – 1 further questioned how the Plaintiff and his predecessor in title – Mr. Ranjan Madan Gopal Saini - would acquire the title deed while hey were still in occupation of the land. For all these atrocities and short – comings according to him, he blamed the Government for not fulfilling its obligation and/or responsibility of ensuring that all the Defendants were settled on the Government land having been so declared. He further blamed the Government officials for colluding with the Plaintiff and dispossessing them of their rightfully entitled land. He prayed for the Certificate of Title deed issued to the Plaintiff to be annulled and the prayers sought in the Counter Claim granted.

84. From the correspondences produced by the Defendants being from the National Land Commission and so forth indicate that there were eight (8) parcels which had within the large Kijipwa Settlement Scheme but which the allottees had been allocated much bigger portions than the required 2.5 acres and title deeds issued. These eight (8) parcels were:-

    a. Kilifi/Kijipwa/35 – (sub – divisions into 16 parcels Nos. 361, 362, 363, 364,365, 366, 367, 531, 532, 533, 930, 931, 1338, 1356, 1474 & 1475 – allocated to M/s. Caroline Mumbua Malinda, Pink Homes Limited, Mr. Agil Mohamuod Salim; Mr. Firdausi Mohamoud Salim; M/s. Fatima F. E Essajee Mangi; Mr. Katana Mwango Katana; Mr. Harrison Runya Yawa; Visisons Investments Company Ltd; Mr. Masud Mohamed Ali Rana; Mr. Abdul Hamid Abdulla and Mr. Nasseir Subeya Saad).

b. Kilifi/Kijipwa/41 – (sub – divided into 20 parcels Nos. 372, 373, 374,375, 376, 377, 378, 379, 380, 13364, 1365, 1466 to 1475 – allocated to M/s. Evangelia Komis, M/s. Anastasia Wamuyu Thiongo, M/s. Emma Nyambura Orfino, Mr. Abdul Aziz Abdalla Said, Mr. Ramesh Kumar Dharna, Mr. Yash Vir Djarna, M/s. Virginia Njeri Ngugi, M/s. Catherine Nduta Mbugua, M/s. Virginia Njeri and M/s. Esther Lilian Achieng).

c. Kilifi/Kijipwa/43 – (sub – divided into 53 parcels Nos. 427 to 480 – allocated to Mr. Thaorbhai Kashibhai Patel, Fort properties Limited, Mr. Mahesh Kumar and Mr. Roajibhai Patel).

d. Kilifi/Kijipwa/277 – allocated to Mr. Boniface Mg'anga; Mr. Ravind Ranath and Mr. Dahybhai Bhaghat).

e. Kilifi/Kijipwa/278 – allocated to M/s. Bertha Gambira Bockle and M/s. Amina Chabi Mohamed).

f. Kilifi/Kijipwa/53 – allocated to Fort Properties Limited and Mr. Stephen Timothy Mwakisha).

g. Kilifi/Kijiwa/96 – allocated to Mr. James Mbandi; Mr. Kinyungu Silvester and Mr. Maundu Mbandi); and

h. Kilifi/Kijipwa/48 – allocated to Mr. Rajan Madan Gorpal Saini.

85. In as much as the Court fully concurs with the Defendants that land may have been under the Settlement Scheme by Government. Nonetheless, it is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the "Burden of Proof" and is encapsulated for by Section 107 of the *Evidence Act* Cap 80 laws of Kenya. Evidently, from above facts indicate and produced by the Defendants themselves there exists no land known as Kijipwa Settlement Scheme. These parcels were already alienated through numerous sub – divisions band allocated to individual where Certificate of Title were issued in accordance with the law. Its instructive to note that though complaints were lodged to various formal authorities including the Commission on Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndungu Commission)" in the year 2004, the National Land Commission among others but no tangible solution came out of these exercises. Clearly, the Defendants have to change tactics and to adopt more pragmatic "modus operandi" if they have to realize pragmatic solution of attaining permanent settlement on the suit land or elsewhere.

86. Apart from relying on the contents of the letter by the Plaintiff to the Director of Settlement Scheme dated 8th August, 1995 there has been no tangible proof that the Suit Land was under Kijiwa Settlement Scheme for instance an authority letter to that effect a register of the ordinary residents and beneficiaries; the survey map of the area and area list. The Honourable Court has noted that, with profound respect and great humility, the Defendant failed to summon Government Officials from the Director of Settlement Scheme to adduce evidence along this line and support their case;

87. As regards of Land Adverse Possession. The Legal principles that governed the Doctrine of Land Adverse Possession is found under the Provisions of Section 7, 13, and 38 of the Limitation of Action Act Cap 22 Section 7 provides On the claim of land adverse possession. With the background of the matter, the Honorable Court feels it significant to expend a little more time deliberating on the concept

of Land Adverse possession. The Doctrine of Land Adverse Possession is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. Section 7 provides that:-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
>
> The provision of Section 13 on the other hand provides:
>
> (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
>
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
>
> (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

88. Finally the provision of Section 38 states:-

> SUBPARA 38.
>
> (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."
>
> (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

89. From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under article 40 of the constitutions become extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. I take notice that this was exactly what the 1st and 2nd Defendants herein did in the instant suit. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.

90. However, it should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.

91. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24. The principles were well set out in the case of "Kahindi Ngala Mwagandi - Versus - Mtana Lewa [2021] eKLR" where the Court of Appeal sitting in Malindi held:

> " Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-
>
> > "7(1) an application under Section 38 of the Limitation of Actions Act shall be made by originating summons.
> >
> > (2) The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
> >
> > (3) The Court Shall direct on who and in what manner the summons shall be served."

In the case of "Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira", Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- "Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990". See also the present position in case "Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005," where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

92. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming

adverse possession to prove, on a balance of probability that claim. With tremendous respect to the Defendants herein, I have noted apart from annexing a copy of the Title deed, they have failed to adhere with the other requirements for instituting a case of a claim for land adverse possession. Indeed, I have noted that apart from making the assertion from their Amended Statement of Defence and Counter Claim under Paragraphs 19 and Prayers (b) and (d) below:-

> " 19. The Plaintiffs aver that they including their parents have been born at the suit property and have stayed there for over Eighty (80) years without any interruption and indeed continuously and that they have been undertaking all what appertains to such land including burying their dead thereat. The Plaintiffs further aver that sometimes in the 1970's or thereabout, they, through their parents did engage the Government of the Republic of Kenya on their need to be securely settled within the suit property and all the other neighboring parcels of land a result whereof the Government proceeded to declare the Kijipwa Settlement Scheme which measured over 500 acres of land and the said scheme was accordingly held by the Settlement Trust Fund in trust of the people then residing thereon. The Plaintiffs contend that the First Defendant in the Counterclaim, Halai Brothers Limited, has never been a resident of or lived on the suit property or at all hence did not have any right for any consideration for allocation of the suit property to it.....
>
> b) A declaration that the suit property herein being the parcel of land known as KILIFI/KIJIPWA/48 being part of the Kijipwa Settlement Scheme was. intended to and remains for the benefit of the Plaintiffs who have a11along been in physical possession and occupation thereof since time immemorial all through to the declaration of the Kijipwa Settlement Scheme and up to now given the fact that the Plaintiffs know of no any other homes and /or lands in their lives and have loved thereat in the utmost belief that the parcel of land shall eventually be reqistered in their favor more so on the declaration of the Scheme and a further declaration that subsequent allocation , transfer and registration of the same to the First Defendant herein remains fraudulent, illegal, unconstitutional and in breach of trust hence null and void ab initio and incapable of creating any valid proprietary interest unto the First Defendant herein.
>
> d) A permanent injunction be issued restraining the First Defendant whether by himself , his agents , servants and /or appointees and/or employees or otherwise from in anyway whatsoever undertaking any transactions thereon including sale, charges, leases , subdivisions among others , taking possession , obstructing stopping, interfering with the Plaintiffs' quite use, enjoyment , possession and occupation of the suit property being Plot No. Kilifi/ Kijipwa/48.
>
> e) Costs of and incidental to this suit.

93. The claim is very thinly made in passing as an afterthought. This Court is not persuaded there exists any commitment by the Defendants whatsoever.

In the case of: "Kimani Ruchine – Versus - Swift Rutherford & Co. Ltd (1980) KLR it was stated on this point that:-

> " The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario ..... So the Plaintiffs must show that the company had knowledge

(or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endevours to interrupt it or by any recurrent consideration; See the case of:- "Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J."

In Teresa Wachuka Gachira (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

"There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor"

94. In a summary for the Doctrine of land Adverse possession to be applicable the following ingredients have to be fulfilled. These are:-

a. The Applicant must prove that he had occupied or owned the land openly that was without secrecy, without force and without permission of the land owner with intention to have the land (of right: nec vi, nec clam, nec precario).

b. The party claiming ownership ought to have occupation of the land exclusively, continuously and uninterruptedly for a minimum of 12 anticipated years.

c. The occupation of the property must be non - permissive and non - consensual. Occupation must be open and notorious. (See the case of ELC No. 1257 of 2014 (OS) – John Otieno Obade & 299 Others – Versus – Teresia Wairimu Kirima & Anne Wangari Kirima")

95. It was the Plaintiffs testimony which was never controverted that by the time of purchasing the property the place was bushy and vacant. He stated that had there been any occupation on the land they would not have bought it from Mr. Saini.

Indeed, when the contractor went to cause the building of a boundary wall and surveying of the land there was nothing on the land. He was confronted by people who were not occupying the land to stop what he was about to undertake.

Based on the report by Tyson Valuers, dated 10th march, 2015, marked as Plaintiff Exhibit No. 11, shows that by the year 2015 there were very few semi permanent settlements; development; one permanent house; piped water; a school and construction materials for new construction on the suit property. This being an expert report was never controverted by another report. In short, there was no occupation as alleged. Besides, the Court has noted that there has never been any continuous and un interrupted stay with all these protracted legal suits from over twenty (27) years now. Indeed, the defence of historical injustice was never pleaded by the Defendants. The provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 holds that parties are bound by their own pleadings.

I wish to point out the phenomenon of squatters invading into people's land in the Coastal Region is taking precedence and needs to be controlled before it gets out of hand. For instance the famous Waitiki case of Likoni Serious Settlement Scheme need to be adopted to amentorate the situation.

For these reasons, I decline to grant orders prayed in Counter - claim.

ISSUE No. (b) Whether the suit filed by the 1st and 2nd Defendants through the undated Amended Defence and Counter Claim filed on 25th March, 2021 meets the threshold;

96. Finally, the Defendants have vehemently challenged the title deed held by the predecessor and the Plaintiff for being gotten through fraud and irregular. The allegation of fraud is a very serious allegation. Should they succeed it would lead to this Court nullifying, annulling and concealing the title deed. For this reason Court have in a myriad of cases held that allegation of fraud have to be proved. "Central Bank of Kenya Ltd –Versus- Trust Bank Ltd & 4 others (Supra).

97. Despite of this, the Defendants failed to discharge this duty effectively. For instance, they never filed any investigation report on how the Land Office Government Officers colluded with the Plaintiff to issue title deed. Further, they claim that the predecessor was an employee of the Ministry of Land and hence through that he acquired the land. There was no proof in form of an employment letter or even applying to be issued with witness summons to have Mr. Ranjan Madan Gopal Sairi summoned to testify to that effect.

Indeed, the Plaintiff produced a Valuation Report from Tyson Valuers Ltd dated 10th March, 2015 and giving the suit property a sum of Kenya Shillings Two Ninety Five Million (Kshs. 295, 000, 000.00/ =) by then which is close to ten years ago. It was marked as Plaintiff Exhibit 11. By now the land has appreciated drastically. The Defendants never produced even photographs to demonstrate that they were in actual possession and occupation of the Suit Land. For these reasons, the relief sought on title through land adverse possession in the Amended Defence and Counter Claim fails.

ISSUE No. (c) Whether the parties herein are entitled to the reliefs sought from the filed pleadings

98. Under this sub – heading, luckily on 13th October, 2023 with the consensus of the parties, the Court conducted a successful Site Visit on the land. It was based on the provision of Section 173 of the *Evidence Act* Cap. 80 and Order 18 Rule 11 of the Civil procedure Rules, 2010. From the observations made out during the site visit there was a lot of revelations.

On the issue of whether there was trespass by the Defendants in the undated amended Counter claim and if an Order of Permanent Injunction should Issue, this Honourable Court has held that the title by the Plaintiff which was passed to him by the predecessor of the title and subsequent development of the suit property can be seen as trespass. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

> "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

Trespass is described under the *Trespass Act* Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)

A continuing trespass is defined in:- JOWITT's DICTIONARY OF ENGLISH LAW 2ND EDITION as follows:-

> "A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land".

99. Finally, in the CLERK & LINDSEL ON TORTS 16TH EDITION, paragraph 23 - 01, it is stated that:-

> " Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".
>
> Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. Undoubtedly, from the fact in this case, the Defendants have trespassed onto the Plaintiff's land. Having found that the Defendants trespassed into the Plaintiff's land, the next issue is whether as a result of the same; the Defendants should be permanently restrained.
>
> On the prayer sought by the Plaintiff for being granted permanent injunction orders restraining the Defendants from dealing with suit property. I wish to make reference to Korir, J who aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of "Kenya Power & Lighting Co. Ltd -Versus - Sheriff Molana Habib (2018) eKLR" when he stated thus:-
>
> > " A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected."

100. Additionally, I am guided by the principles on Injunction set out in the celebrated case of "Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358". The Plaintiff produced a title document and demand letters to the effected of asking the Defendants to vacate the land. I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Indeed, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner. Based on the surrounding facts and inferences of this case, therefore, the prayer is meritorious and hence granted thereof. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and / or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit land

101. Further, the Honourable Court has been urged to find whether or not the Plaintiff is entitled to General Damages as sought. From the foregoing, it is already a foregone conclusion that the Plaintiff is the absolute, rightful and indefeasible owner of the suit property herein. At the same time. I have also held that the Defendants in the undated Amended Defence and Counter claim are guilty of encroaching and trespassing onto the Plaintiff's land. The said trespass whose magnitude was found to be 19.89 Ha, did deny the Plaintiff use, occupation, possession and enjoyment of said land. From their own testimony, the Defendants on the other side have been cultivating and enjoying the use of the unlawful actions. It is this loss of use and all the incidental rights that have been infringed by the Defendants in the Counter claim that the Plaintiff now seeks compensation for.

In the case of "Duncan Nderitu Ndegwa – Versus - KP& LC Limited & Another (2013) eKLR" where P. Nyamweya J. held that: -

> 24. "...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards

an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass"

In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-

(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

(b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

(c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

(d) --

(e) --

On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of "Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR" where it was held as follows:

> 25. "The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – Versus – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

102. From the evidence on record, the Plaintiff has already proved trespass though there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the Defendants and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Plaintiff indeed suffered damages as a result of the Defendants' continued acts of trespass. For these basic reasoning, I will proceed and award them a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000.00/=) as general damages.

103. Be that as it may, this being a Court of Law and established under the provision of the Article 162 (2) (b) of *the Constitution* of Kenya, 2010, and also governed by several other statures such as Sections 3 and 13 of the Environment and *Land Act*, No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012, the Honorable Court is informed by the fact that *the Constitution* is a living tissue. Just like all other living tissues, it has to be fed and watered. It breathes and without oxygen and freshness it will die. With the fullness of time, I have learnt that theses things are not just metaphorical. They are real. We all must know this fact. For a moment, this might sound rather academic but inevitable. The Courts of Law are guided by Jurisprudence, meaning knowledge of or skill in law, which was the first social science to be born. While making interpretation of Law, the Courts are guided by two broad philosophies. These are, firstly, "the Positivism" interpretation of Law, whereby it means that laws are mere commands of human beings with threats of force. It holds that law is valid notwithstanding its merits or demerits. In other words, law and morality are distinct. In a nutshell, positivists hold the view that it is not the business of lawyers and the Judges to say whether a law is good or bad. The business of rendering such moral verdicts is best left to Legislators, philosophers and the public. To them the works of Lawyers and Judges is to apply the Law 'as it is". Secondly, is "the natural" interpretation of the Law. Here it holds that law and morality cannot be divorced from each other. Like the siemese twins they are inseparable and intertwined. They hold that

the law is based on basic human values that are universal and standard. It is based on values of intrinsic to human nature that can be deduced and applied independently of man – made law. Such values include the universal need to preserve human life and livelihoods. It is my intuition that these are the Core Values that the makers and the legal experts of *the Constitution* of Kenya, 2010 had in mind by enacting the provisions of Articles 2 (1), (2), (3), (4), (5) and (6) on the Supremacy of *the Constitution* and the fact that any international treaty or law that Kenya has ratified shall be part of the laws of Kenya; 10 (2) (b) on the Core values of human dignity, equity, social justice, equality, human rights, non – discrimination, protection of the marginased and sustainable development; Articles 43 (1) (b) on social and Economic rights – access to and adequate housing and decent standards of livelihood; 48 on access to Justice and Article 159 (2) (c) on Alternative Judicial System (AJS) currently being strongly advocated as a policy by the Judiciary in terms of resolving disputes amicably, justly, expeditiously and cost effectively. It leaves parties as friends and ones sustaining brotherhood and good neigbourhood. This is as opposed to losing a case and followed by forceful eviction. Recently, the Judiciary adopted some guiding principles known as "The Social Transformation through Access to Justice (STAJ) blue print which are:- a). Accessibility and Efficiency; b). Transparency and Accountability; c). Inclusiveness and Shared Leadership d). Co – operative Dialogue and e). Social Justice. In thus case, the Court is influenced by the (e) aspect of STAJ.

104. While at this point, the Honorable Court wishes to rely on the case of "Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme" where the Court adopted the General Comment No. 7 of the UN Commission on Human Rights and stated:-

> " State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions ar prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No. 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions." The term "Forced Eviction" was defined in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-
>
> > "The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection" .

The Court cited:- "The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)" which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

> " These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those

affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that Sates should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitments .....the Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....

105. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the amendment into the *Land Act*, and inserted the provision of Section 152E of the Land (Amendment) Act, which provides:-

1. "If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without

2. The notice under Sub - Section (1) shall:-

    a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.

    b. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

    c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area".

106. Following this lengthy deliberation, I wish to apply these principles to the instant case. It is imperative to appreciate that the Defendants and as seen from the site visit report prepared by Court do live and continue occupying the suit land. Further, Honourable Court noted there exists a cordial relationship between the Plaintiff and the Defendants. Thus, in order to avoid the Defendant and their families becoming destitute and homeless, based on social justice principles and humanitarian consideration – on gratia basis and the right to housing and settlement as provided for under Article 43 of *the Constitution* of Kenya, 2010, I urge the Government of Kenya and the Plaintiff to consider compensation/re – settlement scheme etc consider based on the doctrine of Compulsory Acquisition of the suit land by purchasing the land from the Plaintiff for purposes of settlement of the Defendants and their properties and hence promptly, adequately, fairly and justly compensating the Plaintiff for the Compulsory acquisition of the land pursuant to the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010; Sections 101 to 118 and 134 of the *Land Act*, No. 6 of 2012; and through Settlement Scheme Program and/or Fund Trustees under the principles of land policy under provision of Articles

10 and 60 (1) of *the Constitution* of Kenya, 2010; Sections 134 (2); 134 (5), (6); 135 (3) (a); 167 & 168 of the *Land Act*, No. 6 of 2012.

ISSUE No. c). Who bears the costs of the suit and the Counter Claim?

107. It is trite law that the issue of Costs is at the discretion of the Court. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

108. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "Reids Heweet & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

109. Additionally, the Supreme Court fortified this position in the case of "Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

> " so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

110. In the instant case, although the Plaintiff has managed to successfully establish its case, in the given circumstances of the case, its just fair, reasonable and Equitable that each party bears their own costs whatsoever.

VIII. Conclusion and findings

111. Ultimately, upon conducting an in-depth analysis of the issues herein, the Honorable Court is satisfied that the Plaintiff from the Further Amended Plaint established a "prima facie" case on the principles of Preponderance Probabilities and the balance of convenience. For avoidance of doubt, I specifically order: -

a. That Judgement be and is hereby entered in favour of the Plaintiff as per the filed further Amended Plaint dated 20th March, 1997 against the 1st and 2nd Defendants jointly and severally.

b. That the Amended Defence and Counter claim dated 25th March, 2021 be and is hereby found to lack merit and hence dismissed.

c. That a declaration that all that suit of land known as Land Reference numbers Kijipwa/Kilifi/48 is legally and absolutely registered in the names of Halai Brothers Limited from 26th March, 1996 with all the indefeasible title, interest and rights vested in them pursuant to the

provisions of Article 40 (1) (a) & (b) of *the Constitution* of Kenya, 2010; Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012.

d. That there be an order for peaceful and lawful eviction from Plot No. all that suit of land known as Land Reference numbers Kijipwa/Kilifi/48 of the Defendants pursuant to the provisions of Section 152E of the *Land Act* No. 6 of 2012 within the next Ninety (90) days from the date of the delivery of this Judgement on or before 28th February, 2024.

e. That there be an order of Permanent injunction restraining the Defendants, their relatives, agents, servants and/or any other person under instructions to the Defendants from alienating, wasting, developing, sub - dividing, charging, trespassing, encroaching upon and/or interfering in any of the said property.

f. That notwithstanding and in the alternative to orders (a) to (e) above, in the meantime the following social and benevolent justice steps to be undertaken:-

i). The Government of Kenya (through the Honorable Attorney General, the National Land Commission and the County Government of Mombasa under Article 67 (2) (e) of *the Constitution* of Kenya, 2010) within the next thirty (30) days from the date of delivery of this Judgement to consider the doctrine of Compulsory Acquisition of the suit land by purchasing the land from the Plaintiff for purposes of settlement of the Defendants and their properties and hence promptly, adequately, fairly and justly compensating the Plaintiff for the Compulsory acquisition of the land pursuant to the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010; Sections 101 to 118 and 134 of the *Land Act*, No. 6 of 2012; and through Settlement Scheme Program and/or Fund Trustees under the principles of land policy under provision of Articles 10 and 60 (1) of *the Constitution* of Kenya, 2010; Sections 134 (2); 134 (5), (6); 135 (3) (a); 167 & 168 of the *Land Act*, No. 6 of 2012; Section; and

ii). The Defendants embrace the offer to purchase the portion of land where they are occupying by entering into a mutually agreed upon sale agreement terms and condition stipulated thereof as per the Laws of Contract Cap 23 and the *Land Registration Act* No. 3 of 2012 and Section 38 of the *Land Act* No. 6 of 2012 at reasonable and equitable rate within the next (90) days from the date of the delivery of this Judgment.

g. That general damages a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000.00 to be awarded to the Plaintiff.

h. That each party to bear their own costs.

It is ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED & DATED AT MOMBASA ON THIS 7TH DAY OF NOVEMBER 2023.

.....

HON. JUSTICE L.L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

a. M/s. Yumna Court Assistant;

b. Mr. Gakuo Advocate for the 1st and 2nd Plaintiffs; and

c. M/s. Jadi Advocates for 1st & 2nd Defendants.